

Public Safety or Bills of Attainder?

by Jon Roland*

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Introduction

During the 20th century, Congress and state legislatures have adopted a great deal of legislation for the ostensible purpose of public safety, by defining a class of persons considered "dangerous", and making it a crime to for such persons to acquire or possess firearms or ammunition or for other persons to convey firearms or ammunition to them. At the federal level, Congress passed the Omnibus Crime Control and Safe Streets Act of 1968,^[1] containing Title VII, §1202 (a)(1) proscribing the possession of firearms by any person who "has been convicted by a court of the United States or of a State ... of a felony." In 1986 Congress passed the Firearms Owners Protection Act,^[2] which has been amended several times. This legislation has been codified in 18 U.S.C. §§ 921-924^[3], and provisions of it sustained by U.S. Supreme Court majorities in such cases as *Lewis v. United States*, 445 U.S. 55 (1980)^[4] and *Caron v. United States*, 524 U.S. 308 (1998)^[5].

However, in 1995 the Supreme Court struck down a part of these sections in *United States v. Lopez*, 514 U.S. 549 (1995)^[6], on grounds of lack of authority under the Commerce Clause, but the provisions have since been restored by Congress with language added relating them to "interstate commerce", and the restored provisions have not yet been tested in the courts. In May, 2000, the Supreme Court decided in *United States v. Morrison*, Docket 99-5^[7], and in *Jones v. United States*, Docket 99-5739^[8], to restrict the civil and criminal powers of the federal government asserted under the Commerce Clause. Although narrowly decided, the opinions in these cases, especially those of Justice Thomas, create a challenge to the entirety of 18 U.S.C. §§ 921-924, as does the present case of *United States v. Emerson*, Cr. Act. C:98-CR-103-C, which struck down 18 U.S.C. § 922(g)(8) on the grounds that it violates the Second Amendment. This holding was reversed, and the case remanded, by the Fifth Circuit, but that decision is expected to be appealed to the Supreme Court, if the government pursues it at the trial level.^[9]

This article argues that in addition to the other violations of the Constitution of provisions of 18 U.S.C. §§ 921-924, its provisions also violate the Fifth Amendment right of due process, and the prohibition in U.S. CONST. Art. I § 9 Cl. 3 of bills of attainder and ex post facto laws, and rest upon violations by the states of the prohibition in U.S. CONST. Art. I § 10 Cl. 1 of bills of attainder and ex post facto laws.

"We the people are the rightful masters of Congress and the courts, not to overthrow the Constitution, but to overthrow men who pervert the Constitution."

— Abraham Lincoln

"Dangerous" persons?

The classes of persons considered too "dangerous" to possess firearms are listed in 18 U.S.C. § 922(g):

(g) It shall be unlawful for any person –

- (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
- (2) who is a fugitive from justice;
- (3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));
- (4) who has been adjudicated as a mental defective or who has been committed to a mental institution;
- (5) who, being an alien –
 - (A) is illegally or unlawfully in the United States; or
 - (B) except as provided in subsection (y)(2), has been admitted to the United

- States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26)));
- (6) who has been discharged from the Armed Forces under dishonorable conditions;
 - (7) who, having been a citizen of the United States, has renounced his citizenship;
 - (8) who is subject to a court order that –
 - (A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;
 - (B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and
 - (C)
 - (i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or
 - (ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or
 - (9) who has been convicted in any court of a misdemeanor crime of domestic violence, to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

However, on ATF forms an applicant for purchase of a firearm must sign, under penalty of perjury, somewhat different language:

Is applicant –

- a. Charged by information or under indictment in any court for a crime for which the judge could imprison him/her for more than one year? An information is a formal accusation of a crime made by a prosecuting attorney.
- b. A fugitive from justice?
- c. An alien who is illegally in the United States?
- d. Under 21 years of age?
- e. An unlawful user of or addicted to marijuana, or any depressant, stimulant, or narcotic drug, or any other controlled substance?
- f. Subject to a court order restraining him/her from harassing, stalking, or threatening an intimate partner or child of such partner?

Has applicant –

- a. Been convicted in any court of a crime for which the judge could have imprisoned him/her for more than one year, even if the judge actually gave him/her a shorter sentence?
- b. Been discharged from the armed forces under dishonorable conditions?
- c. Been adjudicated mentally defective or been committed to a mental institution?
- d. Renounced his or her United States citizenship?
- e. Been convicted in any court of a misdemeanor crime of domestic violence? This includes any misdemeanor conviction involving the use or attempted use of physical force committed by a current or former spouse, parent, or guardian of the victim or by a person with a similar relationship to the victim.

The problem with this somewhat broader language on the form is that the applicant must sign it "under penalty of perjury", and for that purpose the interpretation of the language is not limited to that authorized by the statute. "Any court" could be interpreted to include courts of foreign countries, for "offenses" that would not be offenses in the United States. Whether an alien is "illegally" in the United States is not

always easy to determine, and might be the current subject of litigation. What is the authority for the age limit, especially when under state law the disabilities of minority might have been removed for all purposes except voting? While the statute provides that the substance to which someone might be addicted be "controlled" under 21 U.S.C. 802 §102, under the language of the form the applicant could be prosecuted for being addicted to alcohol, coffee, cigarettes, or chocolate, which are "controlled" under various state and local acts to varying degrees. What is an "intimate partner", and what is the authority for making that a predicate for disablement of a civil right? What if the commitment to a mental institution was only for a few days for evaluation, and the person was determined to be in good mental health? For that matter, what is the authority for a federal agency to require applicants for the exercise of a civil right to sign a statement "under penalties of perjury"? Is there any constitutional authority to prosecute anyone for perjury outside of the territory and jurisdiction of federal enclaves? We will return to these questions below.

Let us examine some the difficulties of defining a class of "felons" or "serious offenders" or "dangerous persons" for whom the right to keep and bear arms is to be legislatively disabled:

1. "Felons" are not always violent people who would misuse a firearm. Some laws are drafted so broadly that penalties that meet the simplistic definitions used in the 1986 Firearms Owners Protection Act are imposed on widely different behaviors. Despite the fact that the Act specifies "violent" felonies, the enforcement of the Act has considered all felonies "violent" just because they are "felonies".

- a. Lewd behavior is a "felony" in some states, but can include anything from relieving oneself in the wrong place, to social protest, to topless sunbathing, to flashing.
- b. Pornography is a felony by some local standards, but what is pornographic changes. The term has been applied to books now considered classics, to classical art such as naked Greek statues, or to parents who innocently took pictures of their children as naked babies.
- c. In many states gambling is a felony, depending on the game played and the amount bet.
- d. Impregnating a woman, even if one later marries her, or even nonmarital cohabitation, can be a felony in some states.
- e. Procuring an abortion was once a felony in most states. If one did it when it was illegal and was convicted, one would be a "felon" for the purposes of the federal Act.
- f. Income tax evasion, or filling out government forms incorrectly, can be a felony. So can donating too much money to a political campaign, defending oneself from attack by a dangerous animal that happens to be a member of an endangered species, filling in a part of one's backyard that some bureaucrat decides is a "wetland", and some types of illegal dumping. Many of these laws do not require criminal intent.
- g. Many states have similar names for crimes, some of which are felonies and some are not. Larceny "over" a certain value may be a "felony", and "under" that value a "misdemeanor", but the value varies from state to state, and even within a state, the laws and values may change.
- h. Penalties for the same offenses have often increased from one year to the next. Conviction of drunk driving in Massachusetts in 1993 would not have disqualified one from having a firearm, but would have done so beginning in 1994.

2. Although The Brady Handgun Violence Prevention Act requires the FBI to destroy the records of checks, that provision is being ignored, and the "instant check" system establishes not just a national gun registration system but a national dossier and tracking system of all citizens. Previously forbidden from maintaining dossiers on individuals unless they were the subjects of a criminal investigation, the federal government is now compiling massive amounts of information on everyone. Not all of that information is correct, yet people are being prosecuted on the basis of that incorrect information.

- a. Each state has different laws and standards. There is no uniform labeling of crimes or characterization of offenses as misdemeanors or felonies. In many states, the older criminal records are not in good order.
- b. Until fairly recently, all records were kept by hand locally. Different courts kept their records in different ways. There were differences in the way judges handled cases.
- c. Many states have methods which allow the judge to impose court supervision without

giving the accused a criminal record. Terms such as "pre-trial diversion", "pre-trial probation", "continuance without a finding", "placing on file", "conditional dismissal", and "suspended finding", describe dispositions which do not result in giving the accused a criminal record. Because judges believed nothing more than a fine would result from such dispositions, they were quick to impose them without much thought to the guilt or innocence of the accused.

d. In some areas, records of closed cases have been destroyed leaving only cryptic entries describing the charges but not the disposition of the case. When the NICS^[10] check is conducted, it frequently turns up these partial records. The "instant check" FBI staff assume the worst, even though the records were ambiguous.

e. Although not authorized by law to do so, the "instant check" also looks at the NICS records of arrests. If no follow up entry was made in that data base indicating what happened after the arrest, the government tends to treat the reported arrest as if it were a conviction. The citizen is then forced to prove he was not convicted.

f. There is no time limit on convictions. A check could turn up a record 60 years old. Tracking down older public records to establish nonconviction or to correct erroneous information can be very difficult.

g. A criminal conviction remains forever unless one is pardoned, has the record expunged, or one lives in a state that automatically expunges a record on the passage of time. Most states do not automatically expunge records, and some that are supposed to do so, don't.

h. Some states seal records after a period of time. The sealing of a record does not remove the conviction, it simply hides it from the general public, and perhaps from the person convicted. If one knows or suspects he may have a sealed record, he should consult with his attorney before answering any governmental questionnaire that asks about convictions.

3. Court interpretations of the Firearms Owners Protection Act have resulted in serious problems.

a. For a time, the federal government refused to recognize state pardons of people with felony convictions and refused to recognize the state classification of a crime as a misdemeanor if the potential penalty was greater than two years. This led to people who committed offenses which were misdemeanors under state law being prosecuted under federal law as though the state offenses had been felonies.

b. People who had received pardons or who had their right to own firearms restored under state law acquired firearms in good faith, believing they were in compliance with the law, only to be prosecuted by the federal government as felons in possession of firearms. To avoid this the Firearms Owners Protection Act was amended to provide that, "Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction under this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms."

c. But this provision has been interpreted by a number of federal district and circuit courts in different and conflicting ways.

i. One argument was that the rights were restored or limited under federal law to the same extent they were restored or limited under state law. This was the argument favored by the dissenting opinion in the *Caron* case.

ii. The other argument was that a restoration of rights had to be full. If any limitation was placed on firearms ownership, the "unless" section applied. This was the argument that prevailed in the *Caron* case, the basis for which was a Massachusetts law that restored a person's right to own rifles, shotguns, and handguns five years after a conviction for a felony, but not his right to carry handguns outside his home.^[11]

4. The other categories, not issues in *Caron*, such as persons with a "history" of "mental disorder" or "addiction" to "depressants" or "stimulants", or the recently added "domestic violence" or "subject of a protective order" provisions of the Lautenberg Amendment to the Act, present similar difficulties of definition, different state and local standards, incomplete, incorrect, or misleading records, and

uncertainty for a reasonable and law-abiding person as to whether one of the categories applies to him.

- a. A person may innocently be unaware of an indictment or arrest warrant, and therefore be a "fugitive" without knowing it.
- b. Many persons are routinely required to have a mental examination, without any indication of mental disorder, yet the fact of the order of commitment or examination represents a "history" that could be used to make possession of a firearm a federal crime.
- c. In most states, the results of medical examinations, but perhaps not the fact of them, are sealed under privacy laws and not available for reporting or inquiry without a court order, preventing the subject from being able to establish that the result of the examination was that he had no disorder.
- d. Some persons cooperate in getting a mental health examination without ever knowing there is a court order.
- e. Mental health examinations can include those made of unruly children who later turn out all right.
- f. There are many kinds and degrees of addiction and mental disorder, most of which do not result in violent behavior, and many addicts or mentally disordered persons completely recover.
- g. Angry spouses can falsely accuse their partners of abuse to strengthen their position in anticipated divorce proceedings, and create an arrest record for the subject, without guilt ever being decided by a court of law.
- h. In many divorce proceedings, protective orders are routinely issued without any basis in reported violent behavior. Sometimes the order is just filed away and never served on the subject.
- i. This Act actually operates to put the burden of proof on the subject that he is not legally disabled.

These points should be recognized for the constitutional problems they represent. Disabling the right to keep and bear arms, or any other civil right, on the basis of events that might be indicative of being dangerous, but are not conclusive of it, are prohibited bills of attainder, just as legislation that incarcerated all persons with a XYY chromosome abnormality, because such persons are prone to violent crime, would be.

The definitions and state of record-keeping is not the only difficulty, however. To explore some of the other problems, let us first consider two relevant precedents:

Lewis v. United States, 445 U.S. 55 (1980)^[4]

The majority opinion of BLACKMUN, J., held that

Even though petitioner's extant prior state-court felony conviction may be subject to collateral attack under *Gideon v. Wainwright*, 372 U.S. 335, it could properly be used as a predicate for his subsequent conviction for possession of a firearm in violation of 1202 (a)(1) of Title VII of the Omnibus Crime Control and Safe Streets Act of 1968. Pp. 60-68.

(a) The plain meaning of 1202 (a)(1)'s sweeping language proscribing the possession of firearms by any person who "has been convicted by a court of the United States or of a State ... of a felony," is that the fact of a felony conviction imposes firearm disability until the conviction is vacated or the felon is relieved of his disability by some affirmative action. Other provisions of the statute demonstrate and reinforce its broad sweep, and there is nothing in 1202 (a)(1)'s legislative history to suggest that Congress was willing to allow a defendant to question the validity of his prior conviction as a defense to a charge under 1202 (a)(1). Moreover, the fact that there are remedies available to a convicted felon — removal of the firearm disability by a qualifying pardon or the Secretary of the Treasury's consent, as specified in the Act, or a challenge to the prior conviction in an

appropriate court proceeding — suggests that Congress intended that the defendant clear his status before obtaining a firearm, thereby fulfilling Congress' purpose to keep firearms away from persons classified as potentially irresponsible and dangerous. Pp. 60-65.

(b) The firearm regulatory scheme at issue here is consonant with the concept of equal protection embodied in the Due Process Clause of the Fifth Amendment, since Congress could rationally conclude that any felony conviction, even an allegedly invalid one, is a sufficient basis on which to prohibit the possession of a firearm. And use of an uncounseled felony conviction as the basis for imposing a civil firearms disability, enforceable by criminal sanction, is not inconsistent with *Burgett v. Texas*, 389 U.S. 109; *United States v. Tucker*, 404 U.S. 443; and *Loper v. Beto*, 405 U.S. 473 . Pp. 65-67. 591 F. 2d 978, affirmed.^[12]

The Court would seem to be making it a federal crime for someone to violate the disabilities of the right to keep and bear arms imposed on him by a state court, but that is not what is being done. While there is a presumption that such a state conviction will entail state disablement of the right, that is not necessarily so. It is possible that the state does not disable the right, or that the disability expires automatically upon completion of other components of the sentence, or at some later time, but such possibilities are presumed not to apply unless the subject can prove otherwise. The Act disables a civil right legislatively at the federal level, on the basis of an event, namely an indictment, temporary order, or conviction in a state court, which is not complete due process, which may not have disabled the right at the state level, or if it did, may have since removed the disability, or may yet remove it, as by a retrial and acquittal or with a pardon, after the subject is prosecuted and convicted of a crime in federal court.

So let us ask two questions, and defer the answers to later: Why does the Act not authorize a federal agency or prosecutor to deliver the subject to a state court for prosecution under state law, and perhaps provide the prosecutor, if the subject has violated a state disability? And if not, what is the constitutional authority to legislatively disable a civil right on the basis of an element of due process, namely indictment or conviction, performed by another sovereign, the state, but perhaps not completed by it, or with a disablement that does not cover the particular instance, or is no longer in effect?

Caron v. United States, 524 U.S. 308 (1998)^[5]

This case further demonstrates how *politics* or *public policy*, without a grounding in *constitutional fundamentals*, can yield a morass of contradictions and unjust outcomes. It arises out of the 1986 Firearms Owners Protection Act,^[2] as amended, which forbids a person convicted of a serious offense to possess any firearm, 18 U.S.C. § 922(g)(1), and requires that a three-time violent felon who violates § 922(g) receive an enhanced sentence, § 924(e). However, a previous conviction is not a predicate for the substantive offense or the enhanced sentence if the offender's civil rights have been restored, "*unless such ... restoration ... expressly provides that the person may not ... possess ... firearms.*" § 921(a)(20) (emphasis added). The petitioner in this case was convicted under the Act for possession of some rifles and shotguns, even though on one of his original convictions he had had his civil rights restored by operation of a Massachusetts law that permitted him to possess rifles but restricted his right to carry handguns. The decision of the Court was to uphold the conviction and longer sentence, on the argument that, although he had a right under Massachusetts law to possess the rifles and shotguns, the disability for carrying handguns made the federal charge applicable under the above "unless" clause, even though he didn't have any, so that if there were any limitations on firearms ownership remaining after a restoration of rights, the federal law prohibited such person from possessing any firearms. That is, even if the state specifically said the person could have certain firearms, the federal law would not recognize that. Justices Thomas, Scalia, and Suter dissented on this argument, but neglected to examine the more fundamental issues that invalidate the entire Act.

The case arose from enforcement of The Brady Handgun Violence Prevention Act,^[1] 18 U.S.C. §§ 921-22 (1994), a political compromise in which the NRA accepted and supported its "instant check" system^[10] by the FBI on prospective purchases of firearms, forbidding purchases to certain categories of persons, as an

alternative to new gun laws. The FBI has claimed that this system has prevented sales of firearms to hundreds of thousands of "felons" and other "dangerous persons", but what seems like a good public safety outcome is often unjust, besides being unconstitutional using the criteria and methods on which the sales are rejected. Where political compromises are involved, constitutional principles tend to be compromised along with the policy preferences, making moot the presumption of the constitutionality of legislation.

While all this might indicate a need to tune the standards, standardize the definitions, and improve state and federal recordkeeping, there is a fundamental problem that was not addressed in this case: *legislative disablement of a civil right*, even upon "conviction" of a "felony".

"Do not separate text from historical background. If you do, you will have perverted and subverted the Constitution, which can only end in a distorted, bastardized form of illegitimate government."

— James Madison

Fundamentals of the Constitution

U.S. CONST. Art. I § 9, Cl. 3:

No Bill of Attainder or ex post facto Law shall be passed.

U.S. CONST. Art. I § 10, Cl. 1:

No State shall ... pass any Bill of Attainder, ex post facto Law, ...

U.S. CONST. Second Amendment:

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

U.S. CONST. Fifth Amendment, in part:

No person shall be ... deprived of life, liberty, or property, without due process of law;

Finally, U.S. CONST. Tenth Amendment:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Let us first consider the Fifth Amendment. What rights are protected by it, what is due process, what does it mean to deprive a person of such a right?

Due process is a judicial proceeding, not a legislative or executive proceeding. It begins with a petition to a court, and ends with an order granting or denying the petition, and perhaps with the execution of the order. In between are procedures to insure that the legitimate interests of everyone affected are protected from injustice. There are two main kinds of due process, a *civil* proceeding and a *criminal* proceeding. What distinguishes them is the kind of rights that can be lawfully disabled by each, and the standards for proof. A civil proceeding may only disable a right to property not *vested*,^[13] and when decided by a jury, is decided by a preponderance of evidence and a statutory supermajority. A criminal proceeding may also disable the rights to life, limb, and liberty, and when decided by a jury, is decided by proof beyond a reasonable doubt by a unanimous vote of a jury of twelve. For convenience, all constitutional rights are grouped into those categories.

The great unsettled issue of jurisprudence is how to define what is due process and what is needed to satisfy the requirement for it. Much of U.S. case law since the 14th Amendment is about "substantive" due process or "procedural" due process. When the United States was founded, many of the judicial and quasi-judicial proceedings we have now were unheard of. It is thought impractical to decide minor disablements by the same standards that were developed for criminal felony trials, in which the life of the accused was at stake, but in criminal proceedings the Fifth and 14th Amendments make no allowance or exception for minor deprivations of liberty or property. In civil cases the Seventh Amendment guarantees the right of a jury in cases involving a value of more than twenty "dollars",^[14] which opens the way for lesser due process protections for disablements whose value is less than that. However, there is no such constitutional threshold for criminal proceedings below which lesser due process protections than those

for a trial for a capital offense might be applied.^[15]

So how can we now have lesser due process protections for misdemeanors with penalties of less than six months or a year of imprisonment? Or "civil" proceedings on "infractions" for substantial disablements of either the liberty or property of the "subject", if not always the "defendant", which are decided by judges alone? Or administrative proceedings, without a judge, and without the right of adequate counsel or a jury? Are all these kinds of process "due" enough to meet the constitutional requirement? No they are not. Comparable disablements of rights need comparable standards of due process, and disablement of any of the rights recognized by the Constitution and its amendments require the same standard of due process, including substantial disablements of the unenumerated rights of the Ninth Amendment. A substantial disablement of any right is a "punishment" for purposes of due process protection, even if the proceeding is not called "criminal".

In a competency proceeding, which may adjudge the subject mentally defective, or commit him to a mental institution for more than a brief examination, or disable his right to keep and bear arms, the subject should have the same right to a unanimous verdict of a jury of twelve, that he would have if he were being prosecuted for a crime for which the penalty was imprisonment. Likewise if the "penalty" were the deprivation of the property right of practicing his profession, or the parental right of visitation with a child, or the right to vote and hold office, he should also have the same due process protections that someone accused of a capital offense would have.

Bills of attainder and ex post facto laws

Let us now turn to the prohibitions against bills of attainder and ex post facto laws. Established precedents tend to define these terms narrowly. These precedents are confusing, incomplete, and do not reflect all the rights the mandates were meant to insure. They come from isolated unrelated cases. They may have even served to detract from the rights the mandates were meant to preserve because they only reflect portions of what a bill of attainder actually is.

From English law a punishment less than death without a trial is considered to be a bill of pains and penalties, so one of the issues is to determine whether the phrase "bill of attainder" in the Constitution includes the "bill of pains and penalties" as well.

To establish what a bill of attainder really is requires some research and reflection. One researcher has summarized the definitions in the various sources and precedents: "*A bill of attainder* is a law, or legal device, used to outlaw people, suspend their civil rights, confiscate their property, put them to death, or [otherwise] punish them without a trial."^[16]

In spite of the limited methodology used for determining what is, and what is not a bill of attainder, some elements are:

- A. A bill of attainder proper is the administration of death without a trial.
- B. Any punishment without trial is a bill of attainder under the doctrine of inclusion of "pains and penalties."
- C. Bills of attainder can include any legislative act which takes away life, liberty, or property. (This concept is mostly ignored by courts and legislatures.)
- D. Bills of attainder can apply to specifically named individuals or easily ascertainable groups (including the group of everyone).

One of the greatest hazards of bringing a bill of attainder case is one cannot count on the court to support any of the concepts above. In cases where Article I mandates are addressed, the courts sometimes respond to Article III mandates instead. Most courts avoid the issue.

A criminally prohibited act can be *malum in se*, an actual injury to someone, or *malum prohibitum*, which is normally justified as an attempt to *prevent* injury. But opening legislation to preventive measures is dangerous. Punishing people for their past offenses can be justified as prevention of future crimes, and past crimes are indeed usually the best predictors of future crimes, but when legislators try to use acts other than crimes as predictors of crimes, and prohibit those alleged predictive acts, they are disabling the right of the people to engage in such acts for innocent purposes.

Preventive legislation was not unknown to the Founders, but most of their criminal legislation presumed an act which was an injury to a victim. The difficulty with preventative statutory prohibitions is that they involve disablement of everyone's rights on a theory of causation that may not be valid, and may have unintended consequences that are worse than the intended ones. The prohibition of alcohol by constitutional amendment was a classic failure of this kind, and the present "war on drugs" seems to be another one. All too often the predictors chosen are weak or dubious causes of the evil the measure seeks to avoid, and are beneficial in other ways that may greatly exceed the hazards. However, the predictors are too often dramatic in their adverse effects, but diffuse in their beneficial effects, misleading public policy to focus anecdotally on the harm while ignoring the benefits.

Although historically bills of attainder have sometimes imposed punishment legislatively for past acts which may have already been prohibited as crimes, or acts not prohibited as crimes when committed, which would be make them *ex post facto* laws, some have been justified as preventive, and sought to avoid political opposition by being imposed on a minority class or faction out of power. This would make bills of attainder the legislative equivalent of civil injunctive or mandamus relief, but without the trouble and expense of the plaintiff proving he would be injured if the relief sought is not granted. If done for alleged past acts that were crimes, it is disablement of public rights without due process of law, but if preventive, it is disablement of public rights for possible future acts, and that is in clear conflict with the purpose of government being the protection of rights. Rights may sometimes conflict and need to be balanced, but actual rights must be balanced against actual rights. It does not work to disable actual rights to prevent possible future infringements of rights that may never occur.

The linking of *ex post facto* laws and bills of attainder to criminal actions fails to consider that the purpose of these provisions is protection of the rights of defendants, and it matters little, except perhaps to the reputation of the defendant, whether the action is called "civil" or "criminal" if the right sought to be disabled is the same. A competency hearing that seeks to confine the defendant to a mental institution is a petition to disable the liberty of the defendant, and as such must be accorded the same due process protections that a "criminal" action would have that sought to imprison the defendant. For the defendant there is little difference between confinement in a mental institution and confinement in a penal institution.

These considerations also open the question of the constitutionality of punitive damages in civil cases. They imply that such punitive damages are necessarily of a character that requires criminal due process. There is no constitutional prohibition against combining civil and criminal cases in a single action, but punitive damages must be imposed by a unanimous verdict of a jury of twelve, based on proof beyond a reasonable doubt, with all the due process protections of criminal trials.

Weak definitions from court decisions

U.S. v. Brown, 381 U.S. 437 (1965)^[17], *U.S. v. Lovett* 328 U.S. 303 (1946)^[18], and *In re Yung Sing Hee* (1888)^[19] establish bills of pains and penalties as punishment without trial, and included within the prohibitions of bills of attainder. The precedent that best reflects most of the original intention of the mandates is from *Cummings v. Missouri*, 71 U.S. 277 (1867).^[20] It states, "A bill of attainder, is a legislative act which inflicts punishment without judicial trial and includes any legislative act which takes away the life, liberty or property of a particular named or easily ascertainable person or group of persons because the legislature thinks them guilty of conduct which deserves punishment."

U.S. v. Lovett was a case historically relevant to taking away pay checks of government workers Congress could accuse of being Communists. This was an asset forfeiture case. It states:

"Legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a trial, are 'bills of attainder' prohibited under this clause."^[18]

The usual argument made for a restrictive construction of the "bill of attainder" clauses is that they only mean "punishment", and that deprivation of rights other than by death or incarceration in a prison are not "punishments" for the purpose of those clauses. The argument is further made, against the group being

very large, or even the entire population, that the prohibitions are only intended to protect "small" groups. But is it the right being disabled, or the number of persons affected, that make a bill of attainder? If it is a bill of attainder when it designates a single individual, or ten, or a hundred, then how many persons have to have their rights disabled before it ceases to be a bill of attainder? What would a legislative act be if it, say, terminated the right to vote for the entire population, and suspended all further elections, or deprived the entire population of the right to practice any religion, or to speak critically of the government, or to keep and bear arms (except, of course, the elites in control of the government)? It would be unconstitutional, and not just because it violated rights explicitly recognized and protected, but because it would be a bill of attainder. And it would be a bill of attainder if it disabled any of the unenumerated rights recognized in the Ninth Amendment.

The argument is further made that all legislation has some adverse effect on some people, and that it is often possible to identify from the statement of the legislation who those persons adversely affected will be, making them an identifiable group to which the bill of attainder clauses might apply if the clauses were interpreted broadly. Any regulation, or tax, it is argued, will deprive some people, perhaps most persons, of property or the use or value of it, so if the bill of attainder clauses were interpreted as broadly as it is herein being argued we should, the prohibitions would be prohibitions on all legislation. This argument is specious. The delegated powers to regulate and to tax were intended as exceptions, provided that they be exercised in a reasonable and uniform manner. The same argument could be made about the takings clause of the Fifth Amendment, and indeed there is a large and murky body of case law that has arisen to determine at what point the impact of legislation, or executive actions under the authority of legislation, on the property rights of persons, becomes sufficiently severe to constitute a "taking" requiring compensation.

Interpretative guidance from the Founders

One clue to the proper interpretation of the bill of attainder and ex post facto clauses can be found in the many statements, by Madison and others, that the Bill of Rights, which includes the Fifth Amendment with its protections for due process and uncompensated taking of property, were not necessary because there were no powers delegated to violate such rights, or that such prohibitions as were needed had already been included in the original Constitution.^[21] If that is so, then we should be able to find all the protections of the Bill of Rights, including the Fifth Amendment, in other clauses of the original Constitution, or in the absence of clauses. If we search the clauses of the original Constitution with this in mind, we find the bill of attainder and ex post facto prohibitions being the only clauses that could have the same meaning, in terms of limits on, or nondelegations of, powers, as those clauses in the Fifth Amendment requiring due process and prohibiting uncompensated takings. If a broad interpretation of the bill of attainder clauses is not appropriate, then what is the basis for the prevailing broad interpretation of the semantically equivalent Fifth Amendment clauses?

All the provisions in the Constitution that were meant to preserve the right of private property over the right of the government to take property have been abused to the point that there is no protection for private property. The evidence that this was never meant to be is overwhelming. Founder Samuel Adams said, "*Now what liberty is this when property can be taken without permission.*" Some case law exists that reflects this idea. Cases like, *U.S. v. Brown*, *U.S. v. Lovett*, and *Nixon v. U.S.*, 978 F. 2d 1269 (1992)^[22], all state the government does not have the right to confiscate property. One can wonder if the opposition in the *Nixon* case had invoked *Calero-Toledo*^[23], would President Nixon have lost his rights to private property? As it stands, it is another case of the bill of attainder mandates protecting the right to private property.

The preservation of a group or individual's protection of life, liberty, and property have fallen by the wayside in American law. Any prosecutor that waves *Calero-Toledo* in front a judge takes any property he wants, and in some cases without a trial. It has also been ruled in *U.S. v. Ursery*^[24], that it is not a violation of the Double Jeopardy clause to pursue both criminal and civil punishment in cases arising from the same offense. Further, the Court in *Bennis v. Michigan*^[25] has allowed the confiscation of

property from "innocent owners" without due process. So much for "any" legislative act, so much for "any" protection at all from the bill of attainder mandates. No matter what relevance the mandates had in our past without the protection from bills of attainder in our law we have been robbed of the civil rights the Constitution was meant to preserve.

Further insight comes from examining several questions. Are bills of attainder and ex post facto laws disjunctive, is one a subset of the other, or do they overlap partially but not completely? Clearly, ex post facto laws are bills of attainder when they apply to the class of convicted persons and operate to increase the penalty, or likelihood of penalty, for them. Therefore, a class of persons convicted of something can be a suspect class for which, if a legislative act imposes a penalty on them, either after sentence is passed, or not as part of the sentence, that act is a bill of attainder.

Does it have to be a legislative act to be a bill of attainder or ex post facto law? No. Executive acts, purportedly under color of authority of a legislative act, such as regulations or administrative actions, can have the effect of a bill of attainder or ex post facto law, and therefore the act which authorizes the executive action, to the extent it authorizes that executive action, is a bill of attainder, and if the effect is retroactive, an ex post facto law.

The discussion during the Federal Convention limited bills of attainder and ex post facto laws to criminal disabilities, but examined more carefully, they are actually just a complementary way to restate the requirement for due process in the Fifth Amendment, and include vested property as well as life and liberty. The Fifth Amendment says constitutional rights may only be deprived by judicial due process, and the prohibitions are against doing that by legislative process or executive process not based on a court order. Together, they emphasize that any disablement of a constitutional right must be by order of a court of competent jurisdiction upon petition and proof under due process protections of the rights of the defendant.

There is one way, however, in which the semantic content of the prohibition against bills of attainder and ex post facto laws differs from the protections of due process rights under the Fifth and Fourteenth Amendments. The latter creates standing for petition for redress only after one's rights have been violated. The former creates standing for petition for redress upon adoption of the legislation, and implicitly recognizes the right, which can be considered to be included in the unenumerated rights of the Ninth Amendment, to not have legislation enacted which creates the fear of prosecution, even if that prosecution does not occur. In other words, any person who might be subject to the act, even if not being actively threatened by it, and without admitting to being subject to it, or to having it apply to him, would have standing to seek a declaratory judgement that the act was unconstitutional. While this is contrary to current judicial practice, it follows logically from the words of the Constitution.

What the legislative branch can do is prescribe the penalties to be imposed upon conviction of a crime. Indeed it must prescribe some such penalties for it to be a crime. But those penalties must be made explicit in the sentencing order to disable the rights of the defendant, and if they are not, then the disablement is not by due process, even if there was a trial.

A thought experiment

To understand this point, let us conduct a thought experiment. Suppose someone petitions a criminal court to prosecute an accused person for some offense, say, "parting one's hair on the left", and he seeks the death penalty. The first thing he would have to do is get an indictment from a grand jury. Could he get one? Of course. The grand jury is not supposed to return a bill of indictment on a charge that is not authorized by a lawful penal statute, but they might be willing to indict a ham sandwich, so they might do it anyway.

So the newly authorized prosecutor asks for a trial date, and the defendant's counsel moves for dismissal on the grounds that there is no statute authorizing the charge. The judge is supposed to dismiss the case on those grounds, but suppose he doesn't. Happens all the time. So it goes to trial, and the defendant demands and gets a jury.

Now, could the jury convict the accused of parting his hair on the left? Sure it could. The accused admits

he parts his hair on the left. There are plenty of witnesses with evidence that he does so regularly. Now, the jury is not supposed to find the defendant guilty of the offense, because, logically, to be guilty of an offense requires not only that he did it as a matter of fact, but that what he did is an offense of the kind he is being charged with doing, in other words, that it really is a criminal offense, an act which the constitution authorizes the legislative branch to pass legislation to prohibit, with criminal penalties for those convicted of doing it. So let's suppose the jury unanimously votes to convict anyway.

Now there is a verdict. The accused has been *convicted*. Has he been deprived of any rights by that event? No. All the verdict does is authorize the judge, or the jury itself if it has the power to prescribe the penalty, to set the penalty, and the judge to issue the sentencing order.

What does the sentencing order do? It does three things. First, it *disables* one or more rights. That is, it restricts their exercise. In legal theory, constitutional rights are never "lost" or "terminated", but only "disabled", and disabilities can be removed, whereas rights, since they don't come from government, but pre-exist it, could not be restored by government if ever "lost". Second, it *penalizes*, or imposes a loss of life, limb, liberty, or property that has been enabled by the disablement of the rights of the defendant. Third, it *authorizes and directs* an official to carry out the penalty. These three components may be collapsed into a few words, but an analysis of what a proper sentencing order does can always be resolved into these three phases.

So let's return to our thought experiment. The jury has brought a verdict of guilty, and thereby authorized the judge to issue a sentencing order. But the prosecutor has demanded the death penalty. Can the judge impose that penalty, even though neither the offense or such a penalty is authorized by law? He is not supposed to. He is limited to those penalties which the legislature has prescribed for that offense, and if there are no penalties, there is no offense, even if the defendant has been "convicted".

So let's assume the judge has finally looked up the statute which the defendant is accused of violating, and finds there is no such statute, or maybe it is only an administrative statute governing the proper grooming for government employees, with the only penalty for violation being to fire them. Since the defendant is not a government employee, what does the judge do at this point? Sentence the defendant to death anyway? He had better not, if he respects the law. Of course, some judges don't. But what he is supposed to do is only impose the penalties authorized by statute, if any, regardless of what the prosecution is seeking.

So could the legislature prescribe as a penalty the disablement and deprivation of the right to keep and bear arms, as the penalty for some offense, or even for all "felonies", or perhaps all "violent" felonies? Yes it could. It could prescribe a penalty of, say, ten years in prison, a fine, and no right to keep and bear arms for life. But suppose the judge, either through mercy or incompetence, sentenced the defendant to ten years, but omitted the fine or explicit disablement and deprivation of the right to keep and bear arms. If it's not in the sentencing order, can some prosecutor come back on an appeal of the sentence and get the fine or the right to keep and bear arms included in the sentence? In general, court rules and the law do not permit a sentence to be revisited and increased in this way, or offer only limited time and process for doing so. At some point, the sentence is final, and may not be further increased. If there was a mandatory sentence, and the judge did not impose it, the only recourse is against the judge. Nothing further can be done to increase the penalties imposed on the defendant.

So, if it is a violation of due process to later increase the sentence by adding the fine, then how can it be consistent with due process to later add the disablement of the right to keep and bear arms? Both are prescribed by law, both were omitted from the sentencing order. How does the one penalty differ from the other, that one should be beyond later inclusion in the sentence and the second assumed to be part of the sentence without being made explicit in it? The answer is, to be compliant with the mandate for due process, all disablements must be made explicit in the sentence, as well as all orders to apply the deprivations those disablements allow.

The myth that one "loses all rights" on conviction

So where does the notion come from that a defendant "loses all rights" upon conviction, rather than just

those rights disabled and deprived in the sentencing order? Incompetent legal thinking, aided by the lack of political clout by convicted felons and a general public attitude of "let's get tough on crime", but it is unconstitutional.

Cases such as *Lewis* and *Caron* illustrate the subversive way that *stare decisis* doctrine operates to effect a drift away from original understanding. By assigning greater weight to later precedents, and using rules like limits on the length of briefs, and a judicial bias against argument from first principles, the result is akin to the walk of a drunken sailor, from bad precedent to worse, until it becomes extremely difficult to bear the heat from breaking back to constitutional fundamentals.^[26]

So now we can see what the statutes codified under 18 U.S.C. 922-924 do. They legislatively impose a criminal penalty (although it would make no difference if it was civil) on the class of persons convicted (or even just indicted) of a crime, in many cases retroactively, without prescribing it as part of what is to be imposed in the sentencing order. Logically, that is a violation of the requirement for due process and of the prohibitions against bills of attainder and ex post facto laws. It makes no difference that persons convicted or indicted for a crime might present a threat to public safety. So do law enforcement officials acting without lawful authority.

Violation of separation of powers

There is also a fundamental constitutional problem with officials of one sovereign imposing a penalty, either civil or criminal, based in whole or in part on the actions of officials of another sovereign. It is a violation of federalism and the separation of powers. Each branch and level of government is accountable solely to its own electors, and may not delegate authority to officials of another branch or level. In *Lewis*, what happens if the federal government convicts and sentences someone of the offence of carrying a firearm, on the basis of a conviction of a felony in a state court, and then the state offense is pardoned or overturned on appeal? It simply does not work, constitutionally, for the decisions of a state court to determine whether an act is a federal crime. That applies not only to state criminal proceedings, but to things like protective orders, competency hearings and commitment orders, indictments, arrests, issuance of licenses or permits, or any other official action.

The right to keep and bear arms

We should also note that there is no provision of the Constitution or amendments to it that say "the rights to life, limb, liberty, or property shall not be infringed". Does that mean that by due process of law, all those rights except the right to keep and bear arms may be deprived? Logically, if the Second Amendment had been ratified after the Fifth, it would indeed be an exception. But the ten amendments of the Bill of Rights were ratified at more or less the same time, so is the right to keep and bear arms an exception, or is it included within the rights of life, liberty, and property? For the moment we will take the latter position, but leave the question open for later consideration.

For the sake of completeness we also must consider the question of whether "due process" is a right to "life, liberty, or property" that could itself be disabled by due process. Self-referencing can lead to loops in logic and computer programming, and must usually be excluded. So we exclude due process itself from the rights that can be disabled by due process.

Something should be said about the "right to limb". It is mentioned only in the double jeopardy clause of the Fifth Amendment, together with life. Most other references are to "life, liberty, and property", and the Declaration of Independence used the somewhat more expansive phrase "pursuit of happiness" in place of "property", although they were considered synonymous by the Lockean social contract theory which is the basis for both the Declaration and the Constitution. "Limb" is a term of art, and the "right to limb" is the right to not have corporal punishment inflicted on oneself. So a criminal proceeding is one in which the petition is for death, imprisonment, corporal punishment, or deprivation of vested property for the benefit of the state, as a penalty for an injurious public act, and a civil proceeding is one in which the

petition is only for deprivation of property, either for the benefit of the state or for a private party. So does this categorization cover everything that is sometimes referred to by the term "right"? No, these are *constitutional* rights, which include *natural* rights arising from the state of nature, *civil* rights arising from the social contract, and *constitutional rights proper* arising from the constitution. All of them are either *negative* rights against action by government, or *positive* rights of petition and due process. They are not rights against action by private parties, or for an equal share or sufficiency of some scarce resource, other than for petition and due process, because a constitutional right can only be an equal right, and the only rights that can be equal are the rights to not have something done by government or to have equal access to petition for redress for grievances and get a decision on the merits of a claim. This can yield a positive right to adequate defense counsel in a criminal trial, but it is a right that can always be provided by not trying the accused at all.

So what kind of right is the right to keep and bear arms? Life, liberty, or property? Actually, it is a composite of rights of each category. First, it is an implied right of life. A right, to be meaningful, must include the right to acquire and use the means to secure it, and that includes arms, for use in defense of one's own life. Now liberty is also an implied right of life, because we need liberty to preserve and defend it, although it is also a right in itself, because it includes all those activities which make life worth living, that is, happiness. Property can be considered an implied right of life and liberty, since it includes the right to acquire, keep, and use the means to preserve and defend both, but it also a right in itself, since it includes the right to leave one's property to those one cares about, one's family, friends, or others one favors. So the right to *keep* arms is a *property* right and the right to *bear* arms a *liberty* right, and both *support* the right to *life* and other kinds of liberty and property. But the liberty right to bear arms would be meaningless without the implied right to acquire and keep arms and ammunition for them.

But the Second Amendment mentions the Militia. What is the purpose of that? It is intended to recognize that a person has not just the *right* to defend himself, but the *duty* to defend others.^[27] The word *militia* is from Latin, and means "military service" or, since that activity originally included law enforcement and disaster response, "defense service". When used as a collective noun, as it is used in the Constitution, it means any one or more persons performing militia duty. That duty arises out of the *social contract*^[28] to mutually defend one another against abuse of rights, and it includes the duty not only to obey laws, but to help enforce them. The militia clauses have a deeper meaning, however. While all the rights recognized by the Constitution are for the private enjoyment and fulfillment of persons, each of them also corresponds to a militia duty to defend the society. It is not just by exercise of the right to keep and bear arms that we have a duty to defend the community and its members, including ourselves. We also have the duty to exercise our other rights for defense. We do not have the option of not doing our part in defending. That means we have the duty to exercise the right to speak, to publish, to petition, to assemble, to practice religion, to vote, to serve on a jury, and to do every other lawful thing, in defense of the state and its constitution, whenever anything might threaten it.

Now one might ask how religion can be used to defend the state? The answer to that depends on the religion, but most religions seek to develop the virtue of their adherents, and, as many of the Founders observed, civic virtue is essential to the viability of a constitutional republic. Civic decadence is therefore also a threat to the state and its members, and to the extent that religion fosters virtue, it functions as a defense activity, and therefore a variety of *militia*. That does not mean, of course, that people have a duty to take up arms to suppress moral decadence. The limits on the methods by which decadence may be fought remain. The main methods available are social rejection, setting a good example, and moral instruction, especially of the young, but promoting civic virtue is still a civic duty of defense of the community, even if it is only general preparation for potential threats rather than imminent ones. By this argument, therefore, the disablement of the right to keep and bear arms is the disablement of a liberty and perhaps a life right, and not just a property right, and as such can only lawfully be done by a criminal proceeding, with all of its special protections, including the right to a unanimous jury verdict and the standard of proof beyond a reasonable doubt.

So could persons be deprived of their arms, considered as property, if there was just compensation? Yes, if there was some public need for the arms. But there is no power to prohibit such persons from acquiring

more arms, if they can afford them, without a court order pursuant to a due process proceeding, and to disable the right to acquire arms, the due process would have to be that of a criminal, not a civil, proceeding.

No federal police powers on state territory

How, then, can Congress legislatively disable the right to keep and bear arms for the class of persons defined as those having been convicted of a felony, or even just indicted for one? It does so on the alleged authority of public safety, that is, a *police power*, and the power to *regulate interstate commerce*. But does that work? No, it does not. The only delegation of police powers to the union government was limited to federal enclaves created under U.S. CONST. Art. I § 8 Cl. 17.^[29]

First, there is no delegation of police powers to Congress, except within federal enclaves created under U.S. CONST. Art. I § 8 Cl. 17. Second, while "regulation" may be considered "prohibition" of some *modalities* of something, the original meaning of the term is to *make regular*, and that implies there must be some modalities that are permitted. It is not a power to prohibit all modalities, and contrary to the opinion of Chief Justice Marshall in *McCulloch v. Maryland*, 17 U.S. 316 (1819)^[30], the Constitution contains delegations of limited powers, not spheres of action within which the power of Congress is unlimited. Third, the original meaning of *commerce* included only commodities, and only the purchase or trade in such commodities that begins in one state and terminates in another, or is between a state and a foreign nation. It does not include trade within a state, and it does not include agriculture, hunting, mining, manufacturing, possession, transport, or use of anything. And "commerce" certainly does not include everything which has a substantial effect on commerce. That is simply ungrammatical. The power to regulate is not the unlimited power to do whatever it takes to achieve a regulated outcome. That could be used to authorize anything, even genocide. It is only the power to impose civil penalties on certain modalities of trade in commodities. If normal methods of inspection and imposition of such civil penalties are not sufficient to achieve a regulated outcome, then the government may not extend its power to do other things intended to do so.

The final point needs to be made clear. The Founders distinguished between delegations of powers to impose civil and criminal penalties, and considered the latter not to be an implied power of the former, but a distinct power requiring a distinct delegation of constitutional authority. This can be seen in Resolution 2 of the Kentucky Resolutions of 1798^[31], which asserted the prevailing common understanding at the time that the criminal powers Congress had on state territory were limited to the following subjects:

1. Treason (Art. III § 3 Cl. 2);
2. Counterfeiting (Art. I § 8 Cl. 6);
3. Piracy and felonies on the high seas (Art. I § 8 Cl. 10); and
4. Offenses against the laws of nations (Art. I § 8 Cl. 10).^[32]

Although the Resolutions were controversial concerning their apparent claim of state power to nullify national laws, the provisions on the limits of federal criminal power were unchallenged. Thomas Jefferson, the author, did omit one other criminal power, that of disciplining the military and the militia when in federal service, and Congress was granted the powers similar to that of a state on federal enclaves created by cessions by a state legislature of parcels of land to the exclusive legislative jurisdiction of Congress for public purposes.

Most federal criminal powers are asserted to be authorized by the Commerce Clause, as can be seen above by the ways the clauses recite a connection to interstate commerce, like a mantra, but with as little meaning. It is intellectually dishonest to claim that the Founders intended the national government to exercise police powers on state territory, based on the Commerce Clause. The recent decisions in *Lopez*, *Morrison*, and *Jones* are small steps toward unraveling that usurpation. But they also create a fundamental conflict with the decisions in such cases as *Lewis*, *Caron*, and *Ursery*.^[33]

To answer the earlier question about federal prosecution for perjury, it may be considered an implied power of the above subject powers that a person could be prosecuted for perjury in a case against him on

one of the subjects the federal government is empowered to adopt criminal legislation on, but since violation of a state disablement of rights, or of being a dangerous person seeking or in possession of a firearm is not one of them, there can be no constitutional authority for a perjury prosecution.

Remedies

There are several reforms that need to be made at both the state and federal levels:

1. Require all disablements to be explicitly stated in the order of the court, and argued separately in adjudicating the penalty phase.
2. Require the same standards of due process for disablements of all rights recognized by the Constitution, including the right to a unanimous jury verdict for adjudication of mental disorder, addiction, incompetence, or any disablement of the right to keep and bear arms.
3. Establish that in jury trials all legal argument be made in the presence of the jury, and provide jurors with all pleadings, including *amicus curiae* briefs, and access to an adequate law library.
4. Re-establish independent grand juries, and remove impediments to private criminal prosecutions and public access to grand juries, especially in cases of official corruption and abuse.^[34]
5. Establish that any legislative act which has the effect of disabling the rights, privileges, or immunities of any person convicted of a crime, other than by prescribing constraints on the sentence to be imposed, is to be considered a bill of attainder and is prohibited.
6. Strike down or repeal all legislative disablements of civil rights as bills of attainder and ex post facto laws, and violations of due process.
7. Educate lawyers to make more use of bills of attainder and ex post facto arguments in their pleadings, and judges to give weight to them.
8. Educate the public about what bills of attainder are and that they are to refuse to enforce them if they serve on a jury in a case in which someone is charged under one.
9. Establish that assets may not be forfeited but for payment of a specific fine, nor may assets be forfeited which have not been proven to belong exclusively to the person convicted of the crime, nor in excess of what may be reasonably expected to bring the amount of the fine in a public sale, and all proceeds in excess of the fine from such sale shall be refunded to the owner. Limit *in rem* proceedings to items for which there is no apparent owner and the owner cannot be ascertained.
10. Strike down or repeal all federal criminal statutes based on the Commerce Clause, particularly firearms legislation.
11. Limit the role of *stare decisis*, and return to fundamental principles of constitutional interpretation, beginning with original understanding and working forward in every case.^[26]
12. Clearly mark the boundaries between federal enclaves and state territory.
13. So the answers to the two questions posed earlier are, in reverse order, that the federal government has no constitutional authority to make it a crime to violate a state disability of a civil right. All it can do, and what it should do, is deliver any person accused of violating a state disability to the appropriate state magistrate for prosecution under state law, and perhaps provide the prosecutor for the case.
14. The present system of disabling the civil rights of broad classes of persons thought prone to misuse of firearms, based on uncertain events, is unconstitutional, as would be any system of licensing or registration. What could be done, constitutionally, is the following:
15. Establish a central database of court disablements of civil rights which any authority could check quickly.
16. Make sure the database is properly updated when disabilities are removed.
17. Establish severe penalties for filing false information in the database, or failing to promptly correct errors, and compensatory relief and damages to persons if such errors occur and are not promptly corrected.
18. Issuance by either government or private organizations to persons of a certificate showing what his disabilities are, or that he has no disabilities, which he can show to any person challenging his exercise of a civil right, as a way to avoid temporary detention while checking the database.

19. Remove all impediments to the purchase or possession of firearms that do not violate the specific legal disabilities to which a person may be subject.
20. Nothing in the Constitution prevents us from adopting measures that solve the problems before us, but we need to be creative. What we will find is that constitutional measures are also likely to be more effective and less susceptible to corruption and abuse.

All web sites visited during October, 2001.

* The author is president of the Constitution Society, 7301 RR 620 N #155,276, Austin, TX 78726, <<http://www.constitution.org>>

1. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197.
2. Firearm Owners' Protection Act, Pub. L. No. 99-308, 100 Stat. 479.
3. See especially 18 U.S.C. 921 — Firearms, Definitions <<http://www.law.cornell.edu/uscode/18/921.html>> and 18 U.S.C. 922 — Firearms, Unlawful Acts <<http://www.law.cornell.edu/uscode/18/922.html>>.
4. *Lewis v. United States*, 445 U.S. 55 (1980). Opinions with commentary by the author at <http://www.constitution.org/ussc/445-055_.htm>.
5. *Caron v. United States*, 524 U.S. 308 (1998). Opinions with commentary by the author at <http://www.constitution.org/ussc/524-308_.htm>.
6. *United States v. Lopez*, 514 U.S. 549 (1995). Opinions with commentary by the author at <http://www.constitution.org/ussc/514-549_.htm>.
7. *United States v. Morrison*, Docket 99-5, 967 F.2d 264 (8th Cir. 1992). Opinions with commentary by the author at <http://www.constitution.org/ussc/99-0005_.htm>.
8. *Jones v. United States*, Docket 99-5739, 570 F.2d 765 (8th Cir. 1978). Opinions with commentary by the author at <http://www.constitution.org/ussc/99-5739_.htm>.
9. See the opinion by District Judge Sam Cummings, and the brief by Defendant's attorney Sean Healy, at <<http://www.healylaw.com/emerson.htm>>. The Fifth Circuit opinion is 99-10331 at <<http://www.ca5.uscourts.gov/opinions/pub/99/99-10331-cr0.htm>>.
10. NICS — National Instant Check System, not to be confused with the NCIC — National Criminal Information Center.
11. The preceding list of points borrows heavily from an article by Karen L. MacNutt in *Gun Week* magazine.
12. *Lewis v. United States*, 445 U.S. 55 (1980), Syllabus, at <http://www.constitution.org/ussc/445-055_.htm>.
13. *Calder v. Bull*, 3 U.S. 386 (Dall.) (1798). Opinions with commentary by the author at <<http://www.constitution.org/ussc/003-386jr.htm>>.
14. In 1789 the "dollar" was a coin, the Spanish *taler*, containing 416 grains of silver of standard purity. A troy ounce is 480 grains, so a "dollar" is 0.8667 troy ounce, and 20 such coins would be 17.3333 troy ounces. This would represent about \$87.71 in federal reserve notes at the prevailing prices of silver on June 15, 2000, and it is the the minimum "value in controversy" that would preserve the right to trial by jury in a civil case under the Seventh Amendment as of that date.
15. U.S. CONST. Art. III § 2 Cl. 3 requires all crimes, except of impeached officials for removal and disablement of the right to hold future office, to be tried by a jury, which makes no exceptions for "minor" offenses and thereby establishes a minimum standard for due process protection.
16. Thomas M. Saunders, Certified Linguist, started the Bill Of Attainder Project after doing a study through the U.S. Commission On Civil Rights, (CC#93-1-1037), with cooperation from the Justice Department. See <<http://www.isc-durant.com/tom/billofattainder/>>.
17. *U.S. v. Brown*, 85 S. Ct. 1707, 381 U.S. 437 (1965). See also *Communist Party v. Subversive Activities Control Bd.*, 351 U.S. 115 (1956).
18. *U.S. v. Lovett*, 328 U.S. 303 (1946). See <http://www.constitution.org/ussc/328-303.htm>.
19. *In re Yung Sing Hee*, 36 F. 437 (1888).
20. *Cummings v. Missouri* 71 U.S. 277, 323 (1867).

21. Letter from James Madison to Thomas Jefferson, October 17, 1788. See <http://www.constitution.org/jm/881017bor.htm>.
22. *Nixon v. U.S.*, 978 F. 2d 1269 (1992).
23. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974).
24. *U.S. v. Ursery*, 518 U.S. 267 (1996).
25. *Bennis v. Michigan*, 517 U.S. 1163 (1996).
26. See "How *stare decisis* Subverts the Law", Jon Roland, at <http://www.constitution.org/col/0610staredrift.htm>.
27. For more on the militia concept, see the Constitutional Defense page at http://www.constitution.org/cs_defen.htm, especially the *Whisker Militia Treatises*, by James Whisker, at <http://www.constitution.org/whisker/whisker.htm>.
28. For more on the social contract concept, see "The Social Contract and Constitutional Republics", Jon Roland, at <http://www.constitution.org/soclcont.htm>; *The Citizen*, Thomas Hobbes (1647), at <http://www.constitution.org/th/decive.htm>; *Second Treatise on Government*, John Locke (1689), at <http://www.constitution.org/jl/2ndtreat.htm>; *The Social Contract*, Jean Jacques Rousseau (1762), at <http://www.constitution.org/jjr/socon.htm>.
29. See "Federal Jurisdiction", Lowell H. Becraft, at <http://www.constitution.org/juris/fedjur1.htm>. See also *Jurisdiction over Federal Areas within the States* at <http://www.constitution.org/juris/fjur/fj0-0000.htm>.
30. *McCulloch v. Maryland*, 17 U.S. 316 (1819). Opinions with commentary by the author at http://www.constitution.org/ussc/017-316_.htm.
31. See *The Virginia Report*, J. W. Randolph, ed. (1850) at <http://www.constitution.org/rf/vr.htm>.
32. See "The meaning of 'offenses against the laws of nations'", Jon Roland, at http://www.constitution.org/cmt/laws_of_nations.htm.
33. See "Limits of Congressional Powers", Lowell Becraft, at <http://www.constitution.org/becraft/limits1.htm> and "Interstate Commerce", Lowell Becraft, at <http://www.constitution.org/becraft/interstatecommerce.htm>.
34. See "Let's Revive Private Prosecutions", Jon Roland, at <http://www.constitution.org/uslaw/privpros.htm>.